

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling that Clark)	WT Docket No. 19-230
County, Nevada Ordinance No. 4659 Is)	
Unlawful Under Section 253 of the)	
Communications Act, as Interpreted by the)	
Federal Communications Commission, and Is)	
Preempted)	

COMMENTS OF T-MOBILE USA, INC.

T-Mobile USA, Inc. (“T-Mobile”)¹ respectfully submits these comments in response to the *Public Notice* seeking comment on Verizon’s petition for declaratory ruling regarding fees charged by Clark County, Nevada (the “County”) for small wireless facilities installed in public rights-of-way (“ROWS”).² As discussed below, the fees materially inhibit the provision of telecommunications services and represent a clear violation of Section 253 of the Communications Act (the “Act”). The Commission therefore should preempt the fees under Section 253(d) of the Act.

¹ T-Mobile USA, Inc. is a wholly-owned subsidiary of T-Mobile US, Inc., a publicly traded company.

² See *Wireless Telecommunications Bureau Seeks Comment on Verizon’s Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, Public Notice, DA 19-823 (rel. Aug. 26, 2019) (“*Public Notice*”); Verizon, Petition for Declaratory Ruling that Clark County, Nevada Ordinance No. 4659 Is Unlawful Under Section 253 of the Communications Act, as Interpreted by the Federal Communications Commission, and Is Preempted (filed Aug. 8, 2019) (“*Petition*”).

INTRODUCTION AND SUMMARY

T-Mobile commends the FCC for its strong leadership in reducing barriers to wireless infrastructure siting. In the past two years, the Commission has, among other things, facilitated the deployment of replacement poles critical to support next generation wireless services; clarified key elements of the Tribal review process applicable to all cell sites, large and small; established shot clocks to speed the review of small wireless facilities; and, in its *Small Cell Declaratory Ruling*, interpreted Sections 253 and 332 of the Act to further accelerate the deployment of 5G-enabling wireless infrastructure.³ As Commissioner Carr noted recently, “[t]his FCC has been focused on cutting red tape so that all Americans, regardless of where they live, can have access to fast, affordable connections, including through our world-leading 5G. Combined, the FCC’s actions have enabled the U.S. to leapfrog our global competitors and secure the largest 5G build in the world.”⁴ T-Mobile strongly agrees.

Consistent with these already significant infrastructure reforms, T-Mobile submits these comments in support of Verizon’s Petition seeking preemption of Clark County, Nevada’s recurring fees for wireless carriers’ use of public ROWs and attachments to assets within those ROWs. As Verizon explains, the Commission concluded in its *Small Cell Declaratory Ruling* that fees exceeding reasonable costs are barred by Section 253 because they effectively prohibit

³ See, e.g., *Accelerating Wireless Broadband Deployment*, Report and Order, 32 FCC Rcd 9760 (2017); *Accelerating Wireless Broadband Deployment*, Second Report and Order, 33 FCC Rcd 3102 (2018), *affirmed in part, vacated and remanded in part sub nom. United Keetoowah Band of Cherokee Indians in Oklahoma et al. v. FCC*, No. 18-1129 (D.C. Cir. Aug. 9, 2019); *Accelerating Wireless Broadband*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018) (“*Small Cell Declaratory Ruling*”), *recon. pending, appeals pending*.

⁴ News Release, FCC Commissioner Brendan Carr, *D.C. Circuit Affirms Significant 5G Infrastructure Reforms* (Aug. 9, 2019), <https://docs.fcc.gov/public/attachments/DOC-358999A1.pdf>.

the provision of telecommunications by materially inhibiting the ability to deploy in the ROW. Yet here, the County Ordinance does just that.⁵ The Commission should find that the County's recurring fees violate Section 253 because they: (1) do not reasonably approximate the County's actual and direct costs associated with a provider's use of the public ROWs and other assets; (2) are not limited to the County's objectively reasonable costs; and (3) are inherently discriminatory. Any one of these issues would cause the Ordinance to violate Section 253. Because the County has failed to satisfy all three of the fee structure requirements adopted in the *Small Cell Declaratory Ruling*, the Commission should preempt the fee provisions of the Ordinance.

The Commission has ample authority to issue the requested declaratory ruling. Under the Section 5(d) of the Administrative Procedure Act ("APA") and Section 1.2 of the FCC's rules, the Commission has authority to issue a declaratory ruling to terminate a controversy or remove uncertainty. And Section 253(d) of the Act gives the FCC authority to preempt enforcement of any state or local government action that may inhibit the ability of an entity to compete effectively in providing telecommunications services. The Commission should use that authority here to grant the Verizon Petition and declare that the County's recurring fees materially inhibit competition and are an effective prohibition on the provision of telecommunications services – and therefore are preempted.

By preempting the County's unlawful recurring fees, the Commission not only will facilitate the provision by all providers of advanced wireless services, including 5G, to customers in the County – it also will set a meaningful precedent for other similarly-situated localities. As the Wireless Telecommunications Bureau explained recently in denying a request by the County

⁵ Clark County Code, Title 5, Chapter 5.02 *et seq.* (the "Ordinance").

to hold the proceeding in abeyance pending settlement discussions with Verizon, “this matter raises important issues that potentially affect not only Verizon *but also other providers* operating both in *and outside of* Clark County.”⁶ The Commission noted in the *Small Cell Declaratory Ruling* that state and local fees and other charges associated with the deployment of wireless infrastructure can unlawfully prohibit the provision of service “even in places other than where the fees are charged.”⁷ Indeed, other jurisdictions have similar provisions that are being considered, making it necessary to provide more direct guidance and settle these issues. Because the Ordinance is broadly applicable to all providers seeking to deploy in the County and because “deployments outside the County could also be adversely affected” by the County’s recurring fees,⁸ the Commission should swiftly grant the Petition irrespective of the outcome of settlement discussions between the County and Verizon.

I. FEES THAT EXCEED REASONABLE COSTS ARE A BARRIER TO THE DEPLOYMENT OF 5G SMALL WIRELESS INFRASTRUCTURE.

In its *Small Cell Declaratory Ruling*, the Commission correctly recognized that the many-fold increase in small wireless facilities needed to densify networks and support 5G will magnify fees charged to providers, and that “fees that once may have been tolerable when providers built macro towers several miles apart now act as effective prohibitions” when multiplied by the many small facilities to be deployed.⁹ The record before the Commission

⁶ *Verizon Petition for Declaratory Ruling Regarding Fees Charged by Clark County, Nevada for Small Wireless Facilities*, Order, DA 19-927, at ¶ 1 (WTB Sept. 18, 2019) (“*Order*”) (emphasis added); see also *id.* at ¶ 3 (noting that “deployment by other providers in the County may also be deterred if Clark County’s practices are not consistent with the Communications Act”).

⁷ *Order* at ¶ 3 (citing *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9091 ¶ 11, 9118-20 ¶¶ 60-61).

⁸ *Id.*

⁹ See *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9112 ¶ 48.

included numerous examples of excessive and unreasonable fees to access ROWs unrelated to their maintenance, management or cost recovery,¹⁰ including excessive annual recurring fees,¹¹ franchise or use fees,¹² and/or gross revenue fees.¹³ The record confirmed that such fees can cause deployers to pause or decrease needed deployments,¹⁴ to the detriment of consumers and the Nation’s broadband and 5G deployment goals.

In response to this record, the Commission clarified when fees and charges for small wireless deployments violate Sections 253 and 332 of the Act. Namely, fees violate Sections 253 or 332(c)(7) unless: (1) the fees are a reasonable approximation of the state or local government’s costs; (2) only objectively reasonable costs are factored into those fees; and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.¹⁵ The FCC specifically found that gross revenue fees generally are not based on the costs associated with an entity’s use of the ROW, and where that is the case they are preempted under Section 253.¹⁶ The Commission also identified specific fee levels for small wireless facility deployments that presumably comply with the relevant standard including, as applicable here, \$270 per small wireless facility per year for all recurring fees.¹⁷

¹⁰ See *id.* at 9096-97 ¶ 25; T-Mobile Comments, WT Dkt. No. 17-79, at 4 (June 15, 2017).

¹¹ See, e.g., AT&T Comments, WT Dkt. No. 16-421, at 18-20 (Mar. 8, 2017) (“AT&T”); Crown Comments, WT Dkt. No. 16-421, at 11, 13 (Mar. 8, 2017) (“Crown”); ExteNet Systems, Inc. Comments, WT Dkt. No. 16-421, at 10 (Mar. 8, 2017); Sprint Comments, WT Dkt. No. 16-421, at 25-26 (Mar. 8, 2017) (“Sprint”); Verizon Comments, WT Dkt. No. 16-421, App. A at 9 (Mar. 8, 2017) (“Verizon”).

¹² See, e.g., AT&T at 18; Sprint at 27; Verizon, App. A at 2.

¹³ See, e.g., Crown at 13; Sprint at 25, 27; T-Mobile Comments, WT Dkt. No. 16-421, at 12 (Mar. 8, 2017); Verizon, App. A at 2.

¹⁴ See *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9096-97 ¶ 25.

¹⁵ See *id.* at 9112-13 ¶ 50.

¹⁶ See *id.* at 9124-25 ¶ 70.

¹⁷ See *id.* at 9129-30 ¶¶ 78-80.

T-Mobile strongly supports the Commission’s decision in the *Small Cell Declaratory Ruling*, and it applauds the state and local governments who are partners in efforts to help the Nation win the global race to 5G. Unfortunately, unlike their citizens and businesses that now view mobile broadband as an indispensable service, some local governments continue to fail to accommodate wireless technology and the need for advanced wireless networks in their communities – even in the wake of the *Small Cell Declaratory Ruling*. The recurring fees contained in the County’s Ordinance represent a clear violation of the standard announced by the Commission just last year. As discussed below, the Commission should therefore declare the County’s recurring fees to be unlawful under Section 253 and should grant Verizon’s request that the fees be preempted.

II. THE COUNTY’S RECURRING FEES ARE UNLAWFUL AND VIOLATE SECTION 253.

Verizon’s Petition clearly demonstrates that the County’s ROW use fees violate Section 253 and should be preempted. Specifically: (1) they do not reasonably approximate the County’s actual and direct costs associated with a provider’s use of the public ROW and other assets; (2) they are not limited to the County’s objectively reasonable costs; and (3) they are inherently discriminatory. As a consequence, the Commission should preempt the recurring fee provisions in the Ordinance, consistent with the *Small Cell Declaratory Ruling*.

As the Petition shows, the Clark County Ordinance requires wireless providers to pay a number of recurring fees to deploy small wireless facilities in ROWs. For example, a wireless provider must obtain a wireless site license for each small wireless facility deployed in the ROW, at a recurring fee of \$700 to \$3960 per small wireless facility per year based on location.¹⁸ That

¹⁸ Ordinance, Chapter 5.02.080, 5.02.210(b), and 5.02.210(e).

wireless site license fee also is subject to an automatic annual two percent (2%) increase.¹⁹ In addition, a wireless provider must acquire and maintain a master use license agreement, based on a recurring fee of five percent (5%) of gross revenues collected by the provider.²⁰ And the Ordinance imposes an additional recurring fee of at least \$500 annually to inspect small wireless facilities in ROWs.²¹

These recurring fees should be declared unlawful under Section 253 and preempted because the County cannot demonstrate they meet any of the three fee structure requirements set forth in the *Small Cell Declaratory Ruling*. First, the recurring fees do not reasonably approximate the County's actual and direct costs associated with a provider's use of the public ROW. To the contrary, the Petition demonstrates that, based on a report by the County's consultant – who assisted the County in developing the Ordinance – the fees are not cost-based and instead “focus[] on existing and potential County revenues and, in short, charging the highest amounts that ... applicants might pay.”²² The gross-revenue based fee is especially problematic in the absence of any correlation to cost by the County. As the Commission has explained, gross revenue fees “generally are not based on the costs” and, where that is the case, the fees should be “preempted under Section 253(a).”²³

¹⁹ See, e.g., *id.*, Chapter 5.02.210(b)(5).

²⁰ *Id.*, Chapter 5.02.030.230, 5.02.060, 5.02.210(a), (d).

²¹ *Id.*, Chapter 5.02.210(g), 5.02.250.

²² Petition at 14.

²³ *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9124-25 ¶ 70; see also *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 21 (1st Cir. 2006); *Bell Atlantic–Maryland, Inc. v. Prince George's County*, 49 F. Supp. 2d 805, 818 (D. Md. 1999); *AT&T Comm'n's of the Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tx. 1998).

Second, the County has not demonstrated that any costs recovered by the fees are limited to the County's objectively reasonable costs.²⁴ Third, the wireless site license fees (including the annual fee adjustment) are discriminatory because they impose the same fee for a small wireless facility installation regardless of whether the facility is installed in a ROW on a County-owned structure or on a third-party-owned structure (which imposes lower costs on the County).²⁵ Furthermore, the gross revenue-based use fee is, by design, based on provider gross revenues rather than costs imposed on the County to manage or maintain the ROW. This means providers will be charged different fees even though the ROW management or maintenance costs they impose may be the same. As the Petition explains, "[c]harging two wireless providers different recurring fees for imposing the same costs when using the public rights-of-way is discriminatory."²⁶

For all these reasons, the County's recurring fees clearly effectively prohibit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment. Because they therefore violate Section 253 and the *Small Cell Declaratory Ruling*, they should be preempted.

There is yet a further reason preemption is clearly warranted in this case. The County's recurring fees – individually and in the aggregate – far exceed the presumptively reasonable annual rate of \$270 set forth in the *Small Cell Declaratory Ruling*. The Commission has made clear that "there should be *only very limited circumstances* in which localities can charge higher fees consistent with the requirements of Section 253."²⁷ The Petition clearly explains that the

²⁴ See Petition at 25.

²⁵ *Id.*

²⁶ *Id.* at 25-26.

²⁷ *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9129-30 ¶ 80 (emphasis added).

County has not justified any special and sufficiently unique circumstance that would justify recurring fees so dramatically in excess of the presumptively reasonable rate. Given these facts, T-Mobile agrees with Verizon that the Commission should preempt the recurring fees, consistent with the *Small Cell Declaratory Ruling*.

III. THE COMMISSION HAS AMPLE LEGAL AUTHORITY TO GRANT THE PETITION AND PREEMPT THE UNLAWFUL FEES.

The Commission has ample authority to issue the requested declaratory ruling. The FCC has broad discretion as to how it conducts its proceedings,²⁸ and this includes whether to proceed by declaratory ruling.²⁹ Under the APA and the FCC's rules, the Commission has authority to issue a declaratory ruling to terminate a controversy or remove uncertainty.³⁰ Moreover, the FCC has explicit authority to preempt the County's new recurring fees pursuant to Section 253(d) of the Act. Section 253(d) directs the Commission to preempt any state or local requirement that it determines violates Section 253(a),³¹ and this includes preempting enforcement of any state or local government action that may inhibit the ability of an entity to compete effectively in providing telecommunications services.³² And as the Commission

²⁸ *FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965); 47 U.S.C. § 154(j).

²⁹ *See Viacom Int'l v. FCC*, 672 F.2d 1034, 1042 (2d Cir. 1982) (FCC has discretion to proceed by declaratory ruling rather than rulemaking); *Chisholm v. FCC*, 538 F.2d 349, 364-65 (D.C. Cir. 1976) (FCC may adopt new statutory interpretation through declaratory ruling rather than rulemaking).

³⁰ *See* 5 U.S.C. §554(e); 47 C.F.R. § 1.2(a).

³¹ 47 U.S.C. § 253(d).

³² *See Small Cell Declaratory Ruling*, 33 FCC Rcd at 9113-18 ¶¶ 52-58; *see also* Presentation of Barbara S. Esbin, Associate Bureau Chief, Cable Services Bureau, FCC, at the National Conference of State Legislatures Commerce and Communications Committee 1998 AFI Spring Meeting, at 2 (Apr. 17, 1998) ("Section 253 gives the FCC authority to preempt enforcement of any state or local government action that may inhibit the ability of an entity to compete effectively in providing telecommunications services."), <https://transition.fcc.gov/statelocal/ncsl-bse.pdf>.

explained in the *Small Cell Declaratory Ruling*, “Section 253(d) affords state and local governments and private parties an avenue for specific preemption challenges.”³³ The Commission should use this authority to grant the Verizon Petition and declare that the County’s recurring fees materially inhibit competition and are an effective prohibition on the provision of telecommunications services – and therefore should be preempted.

CONCLUSION

By moving quickly to preempt the County’s unlawful recurring fees, the Commission will facilitate the provision of advanced wireless services, including 5G, to customers in the County and set a meaningful precedent for other similarly-situated localities.

Respectfully submitted,

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³³ See *Small Cell Declaratory Ruling*, 33 FCC Rcd at 9138 ¶ 97.